tained, they could, before adjudication, be made subject of a separate bankruptcy notice;

(c) in any event, any balance of a judgment debt, including interest and costs not demanded in the notice, could subsequently be proved in bankruptcy to the official assignee under Part III of the Bankruptcy Act.

The Supreme Court at p 266 para D expressed its opinion as follows:

> Consequently, we are of the view that when you have the judgment in the usual form that we have here, a bankruptcy notice under the Act must require payment of *quantified sum or sums* alleged to be due according to the terms of the judgment as at the date of issue of bankruptcy notice. (Emphasis is mine)

In the later part of the same paragraph the Supreme Court went further to state:

> The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven-day period.

It would appear therefore that the use of the words 'amount' and 'quantified sum or sums' necessarily imply monetary terms and, in my view, to follow Mr Voon's reasoning that the rate of interest stated in the notice could be quantified into monetary terms would be stretching the reasoning a bit too far so as to impose a duty on the debtor to make inquiries as to the amount claimed and in this respect the Supreme Court in the same paragraph said:

> The duty is on the creditor to state the *correct amount* due and there is no obligation imposed on the debtor to make inquiries if the amount demanded is ambiguous or unascertained. (Emphasis is mine)

If the interest is not quantified into the *correct amount* then the debtor is in no position to know *exactly* what is being claimed to be due and payable by him within the seven-day period and it follows therefore that the amount claimed is ambiguous or unascertained in which event it is not imposed upon him to make inquiries. The Supreme Court at p 267 was very emphatic about the interest and costs having to be quantified when it said:

> Thus, on the date of issue of bankruptcy notice, it could not be said of the judgment on the interest and the costs that they constituted a judgment debt presently payable to the creditor, for they had not been *quantified into a liquidated sum*. (Emphasis is mine)

If we examine Form 5 in the Rules relating to bankruptcy notice it could be clearly seen at line three thereof that a definite sum needs to be specified therein. It is thus clear therefore that a liquidated sum must be stated in the bankruptcy notice and applying the rule of strict construction, the notice in this case cannot be deemed to fall within s 3(1)(i) of the Bankruptcy Act and following *Low Mun's* case,[1] the bankruptcy notice was a nullity ab initio and the debtor is entitled to succeed. Even though the debtor in this case has not challenged the validity of the bankruptcy notice, Mr Voon conceded that the court can in appropriate cases in the face of errors of law on the record before it, make the necessary orders as the court deems fit in order to do justice to the case.

In the circumstances and for the reasons set out by me, I have no hesitation in striking out the creditor's petition and accordingly do so with no order as to costs.

Petition dismissed.

Solicitors: *Yong & Co.*

Reported by *Ng Sheau Jiuan*

Datuk Eric Taylor v Lim Foo Yong & Sons Realty Sdn Bhd

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO 433 OF 1977
ZAKARIA YATIM J
4 FEBRUARY 1989

Contract – Damages – Assessment – Defendant undertaking to secure discharge of land – Defendant in breach of undertaking – Plaintiff unable to sell land – Loss of rental income from land – Plaintiff forced by financial difficulties to sell his house at a loss – Rental of alternative accommodation – Whether the losses may properly be claimed – Contracts Act 1950, s 74

The plaintiff had entered into a contract whereby the plaintiff had agreed to sell and the defendant had agreed to buy some shares in a company at the price of $45,000. By the contract, the defendant also agreed and undertook to arrange for the discharge of the charge of the plaintiff's land in the mukim of Cheras ('the Cheras land') to a bank by payment to the bank of the sum of $125,755.41 and interest accrued up to the date of payment. The plaintiff performed his obligations under the contract but the defendant failed to obtain the discharge of the charge and in an action commenced by the plaintiff the High Court made an order for the discharge of the charge to be obtained by the defendants. The trial judge also made an order that the defendant do pay the plaintiff damages to be assessed for breach of contract. The defendant's appeal to the Federal Court was dismissed.

The plaintiff died on 8 August 1977 and his widow as the administratrix of his estate filed an application for an order, inter alia, that the damages be assessed pursuant to the order of the trial judge. She claimed general damages for loss of profits for inability to deal with the Cheras land and for embarrassment and suffering and also gave particulars of ascertained damages in the total sum of $181,500 as follows:

(a) the sum of $100,000 being the loss suffered as a result of the forced sale of the plaintiff's matrimonial house at Kenny Hill ('the Kenny Hill house');

(b) the sum of $44,000 being rental payments from 15 February 1977 to 15 October 1980 and still continuing at the rate of $1,000 pm for alternative accommodation following the sale of the Kenny Hill house; and
(c) the sum of $37,500 being the loss of income from rental of the Cheras land in its agricultural state.

The plaintiff and his wife had completed the purchase of a flat in London on 23 February 1976 and had mortgaged it to assist them in the purchase. They were repaying the mortgage loan amounts by monthly instalments. In December 1976 the plaintiff left for England on the advice of his physician to undergo medical treatment and he stayed in the London flat until his death.

The senior assistant registrar who heard the application received evidence from witnesses, including the plaintiff's widow, and considered documentary evidence and following the assessment had certified that the damages that the plaintiff was entitled to amounted to $181,500 and directed that judgment be entered for that sum with costs to be taxed and paid by the defendant. The defendant appealed.

Held, dismissing the appeal:

(1) The plaintiff had suffered financial difficulties as a result of the breach of contract by the defendant in failing to secure the discharge of the charge of the Cheras land. As a result, the plaintiff was forced to sell the Kenny Hill house. The plaintiff was not in a position to sell the Cheras land because of the existing charge and he could not sell his flat in London because he was occupying it while staying in London for medical treatment. In addition, he and his wife had mortgage loan monthly instalments to pay in respect of the flat, which added to his financial problems.

(2) The plaintiff's widow's claim for the sum of $44,000 being rental payments for alternative accommodation following the sale of the Kenny Hill house was not without merit.

(3) In regard to the claim for loss of rental income from the Cheras land, the senior assistant registrar had considered the valuation report submitted in respect of it and other evidence and the court did not wish to disturb her finding.

(4) All these losses suffered by the plaintiff and his widow arose naturally in the usual course of things from the breach of contract itself. In order to make a particular loss recoverable it is not necessary for the plaintiff to prove that the defendant would, as a reasonable man, foresee that a breach must necessarily result in that particular loss.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-77 of 1989.]

Cases referred to

1 *Hadley* v *Baxendale* (1854) 9 Ex 341; 156 ER 145 (refd)
2 *Toeh Kee Keng* v *Tambun Mining Co Ltd* [1968] 1 MLJ 39 (refd)
3 *Tham Cheow Toh* v *Associated Metal Smelters Ltd* [1972] 1 MLJ 171 (refd)
4 *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd* [1949] 2 KB 528 (follld)
5 *Aruna Mills Ltd* v *Dhanrajmal Gobindram* [1968] 2 WLR 101 (refd)
6 *Koufos* v *C Czarnikow Ltd* [1969] 1 AC 350 (refd)
7 *Bee Chuan Rubber Factory Sdn Bhd* v *Loo Sam Mooi* [1976] 2 MLJ 14 (refd)
8 *Tan Chin Kim Sawmill and Factory Sdn Bhd* v *Lindeteves-Jacoberg (M) Sdn Bhd* [1982] 1 MLJ 18 (refd)

Legislation referred to

Contracts Act 1950 s 74

VP Pradhan for the appellant/defendant.
R Khoo for the respondent/plaintiff.

Cur Adv Vult

Zakaria Yatim J: This is an appeal by the defendant against the decision of the senior assistant registrar given on 28 July 1981 assessing and certifying that damages to which the plaintiff was entitled amounted to $181,500 and directing that judgment be entered for the plaintiff for $181,500 and costs.

Before considering the appeal it is necessary to mention briefly the background of this case leading to the senior assistant registrar's decision to award the damages which is the subject matter of this appeal. The plaintiff applied to the court for judgment to be entered against the defendant for specific performance of a contract dated 24 March 1976 and for damages for breach of contract. Under the said contract the defendant agreed to buy 270,105 shares in Syarikat Harta Tanah Kresen Sdn Bhd (hereinafter referred to as 'Syarikat Kresen'). In consideration of the plaintiff agreeing to sell the shares the defendant agreed and undertook to arrange for the plaintiff's title deed charged to Bangkok Bank Ltd to be released by the bank by 31 August 1976 by payment to the bank of a sum of $125,755.41 and interest accrued up to the date of such payment owed by Syarikat Kresen. The plaintiff had complied with his part of the agreement but the defendant had refused to redeem the title deed charged to the bank without offering any explanation for the refusal. Abdul Hamid J, as he then was, who heard the plaintiff's application, stated in his judgment dated 1 August 1977 that he 'allowed the application and made an order in terms of prayer (1) of the application'. Prayer (1) of the application asked for an order for the discharge of the plaintiff's title deed pledged and/or charged to Bangkok Bank Ltd, Kuala Lumpur. The learned judge also decided that 'damages to be assessed and costs'. The order of the learned judge clearly stated that 'the defendant do pay the plaintiff damages, if any, to be assessed for breach of contract...'.

The defendant appealed against the decision of Abdul Hamid J to the Federal Court. The Federal Court dismissed the appeal with costs and ordered that 'the appellant do discharge the respondent's title deeds charged to Bangkok Bank Ltd, Kuala Lumpur within one month from the date of this order...'.

On 20 August 1980, Datin Peggy Taylor as administratrix of the estate of Datuk Eric Taylor, the plaintiff, filed an application for an order that the assessment of damages pursuant to Abdul Hamid J's decision dated 27 May 1977 be assessed by the registrar and that having so assessed final judgment be given forthwith against the

defendant. She also applied that the costs of the action, including the costs of the application be taxed and be paid by the defendant to the plaintiff.

In her affidavit affirmed on 19 August 1980 in support of the application, Datin Peggy Taylor referred to Abdul Hamid J's judgment dated 27 May 1977 and to the order made thereto, as well as to the decision of the Federal Court dated 24 September 1979. In the same affidavit she applied for damages to be assessed for breach of contract pursuant to the order dated 27 May 1977.

In a further affidavit affirmed on 10 October 1980, Datin Peggy Taylor gave particulars of the damages suffered by the plaintiff as a result of the non-performance of the contract:

Ascertained damages of $181,500 the particulars of which were as follows:

(a) loss of a sum of $100,000 being loss suffered as a result of the forced sale of the plaintiff's matrimonial house at Kenny Hill (hereinafter referred to as the 'Kenny Hill House');
(b) loss of $44,000 being rental payments from 15 February 1977 to 15 October 1980 and still continuing at the rate of $1,000 pm;
(c) loss of income from rental from the said land amounting to $37,500 in its agricultural state.

She also claimed general damages for loss of profits for inability to deal with the land and for embarrassment and suffering.

After hearing the evidence of witnesses, including the evidence of Datin Peggy Taylor and after considering the documentary evidence, the senior assistant registrar issued a certificate as follows:

> Certificate of senior assistant registrar after assessment of damages.
>
> Pursuant to the Judgment in this action dated the 27th day of May, 1977. I do assess and certify that the damages to which the Plaintiff is entitled amount to Ringgit One hundred And Eighty One Thousand Five Hundred ($181,500) and I direct that Judgment be entered for the Plaintiff for Ringgit One Hundred and Eighty One Thousand Five Hundred ($181,500) and costs to be taxed and be paid by the abovenamed defendant to the Plaintiff and/or his Solicitors.
> Dated the 28th day of July, 1981.

On the same date the senior assistant registrar entered final judgment against the defendant in the following terms:

> Final judgment
>
> The plaintiff having on the 27th day of May 1977 obtained judgment herein against the defendant for damages to be assessed and the amount found due to the plaintiff having been certified at $181,500 as appears by the Registrar's Certificate dated the 28th day of July 1981. It is this day adjudged that the defendant do pay the plaintiff the sum of $181,500 and costs to be taxed and be paid by the defendant to the plaintiff and/or his solicitors.
> Dated the 28th day of July, 1981.

Having stated the sequence of events, it is now necessary to examine the law relating to the assessment of damages arising from a breach of contract as in the present case. Section 74 of the Contracts Act 1950 states, inter alia:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach...

It has been said by the Federal Court that the provisions contained in s 74 of the Contracts Act were taken from the principle laid down in *Hadley* v *Baxendale*.[1] The Federal Court, in *Toeh Kee Keng* v *Tambun Mining Co Ltd*[2] at p 40 said: 'Section 74(1) of the Contracts (Malay States) Ordinance 1950 is the statutory enunciation of the rule in *Hadley* v *Baxendale*'. See also *Tham Cheow Toh* v *Associated Metal Smelters Ltd*[3] at p 172.

The principle laid down in *Hadley* v *Baxendale*[1] may be stated as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it...

The principle has been restated by Asquith LJ in *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd*[4] at p 539. Our court has accepted the explanation by Asquith LJ in the *Victoria Laundry* case as the correct restatement of the principle in *Hadley* v *Baxendale*. See *Toeh Kee Keong* v *Tambun Mining Co Ltd*.[2]

It should be noted that the principle in *Hadley* v *Baxendale* as explained by Asquith LJ in the *Victoria Laundry* case is a statement of the law on remoteness of damage in contract. See *Aruna Mills Ltd* v *Dhanrajmal Gobindram*[5] at p 110. In the light of the decision of our court the law on remoteness of damage in contract is therefore as laid down in *Hadley* v *Baxendale*[1] and restated in the *Victoria Laundry case*.[4] Subsection 2 of s 74 which provides that compensation is not to be given for any remote or indirect loss sustained is superfluous in view of the limits imposed in sub-s (1): V Sinnadurai, *The Law of Contract in Malaysia and Singapore, Cases and Commentary* (2nd Ed) p 671.

It should also be noted that the second limb of s 74(1) provides that when a contract is broken the party who suffers by the breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him 'which the parties *knew*, when they made the contract, to be likely to result from the breach of it' (emphasis added). In contrast, the second limb as stated in *Hadley* v *Baxendale*[1] is that the party may recover damages which may 'reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract'. It has been pointed out that our court has ignored this difference and has treated the position under the second limb of s 74(1) to be similar to the second limb in *Hadley* v *Baxendale*.[1] See Sinnadurai, *The Law of Contract* p 670. Thus in *Tham Cheow Toh* v *Associated Metal Smelters Ltd*,[3] the Federal Court applied the second limb in *Hadley* v *Baxendale*.[1] In the *Tham Cheow Toh* case, the Federal Court held, inter alia, that the case fell within the provisions of s 74(1) of the Contracts (Malay States) Ordinance, that is, when damages arising were such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. This is indeed the principle in *Hadley* v *Baxendale*.[1]

The principle laid down in *Hadley* v Baxendale,[1] and restated by the *Victoria Laundry* case has been further explained by the House of Lords in *Koufos* v *C Czarnikow Ltd*.[5] In that case the House of Lords confirmed Asquith LJ's statement of the principle in *Hadley* v *Baxendale*.[1] Lord Reid was, however, critical of some of the statements made by Asquith LJ. He disagreed with the expression 'reasonably foreseeable' in paragraph 2 and the expression 'liable to result' in paragraph 5. He also disagreed with the second half of paragraph 6. Lord Morris did not object to the words 'liable to result' but he seemed to be in agreement with Lord Reid with regard to the second half of paragraph 6. Lord Hodson thought that the phrase 'liable to result' was a colourless expression but he did not find it possible to improve on it. Lord Upjohn was also critical of the second half of paragraph 6. There were no doubt differences of opinion among the members of the House of Lords in the *Koufos* case. But on the whole the House of Lords approved the statement by Asquith LJ. Lord Morris said, 'I regard the illuminating judgment of the Court of Appeal in *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd* as a most valuable analysis of the rule.' Lord Pierce said, 'The language of the judgment in the *Victoria Laundry* case was a justifiable and valuable clarification of the principles which *Hadley* v *Baxendale* was intended to express. Even if it went further than that, it was in my opinion right.' Lord Upjohn said, '...in my opinion Asquith LJ was not attempting to do more than explain the rule in the light of the observations made in this House...'.

Having considered the decision of the House of Lords in the *Koufos* case,[6] I shall now state below, Asquith LJ's explanation of the principle of *Hadley* v *Baxendale*[1] after taking into consideration the decision of the House of Lords in the *Koufos* case.[6]

> (2) In cases of breach of contract the aggrieved party is only entitled to such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.
>
> (3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.
>
> (4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley* v *Baxendale*. But to this knowledge, which a contract-breacher is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.
>
> (5) In order to make the contract-breacher liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of contract but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result...
>
> (6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge, the defendant could, as reasonable man, foresee that a breach must necessarily result in that loss...

Having stated the principle in *Hadley* v *Baxendale*,[1] *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd*[4] as affirmed by the House of Lords in *Koufos* v *C Czarnikow Ltd*,[6] it is now necessary to examine the facts of the present case closely.

As stated earlier, the plaintiff, by a letter dated 24 March 1976, entered into a contract with the defendant whereby the plaintiff agreed to sell and the defendant agreed to buy 270,105 shares in Syarikat Kresen at the price of $45,000. The contract provided that in consideration of the plaintiff agreeing to sell the said shares in Syarikat Kresen to the defendant, the defendant agreed and undertook to arrange for the plaintiff's title deed pledged or charged to the Bangkok Bank Ltd, Kuala Lumpur to be released by the bank on 31 August 1976 by payment to the bank the amount of $125,755.41 plus interest accrued up to the date of such payment. The plaintiff had performed all his obligations under the contract by the delivery of the following documents to the defendant, namely; (a) all the certificates for the said

shares together with the transfer forms for the said shares in the name of the defendant's company; (b) a resolution approving the sale and transfer to the defendant of the said shares and issuing new certificates in the defendant's company; and (c) an up-to-date list of creditors and debtors and all other liabilities of Syarikat Kresen certified as correct. The defendant paid the plaintiff the $45,000 and undertook to discharge the title deed, which was in respect of land lot 467, EMR3680, mukim of Cheras (hereinafter referred to as the 'Cheras land').

In less than three weeks after the plaintiff had concluded the contract with the defendant, the plaintiff, in an option letter dated 12 April 1986 offered to sell the Cheras land, which the defendant had undertaken to secure the release of the title deed from the Bangkok Bank. The letter of option was for a period of one month and the price offered was more than $280,000. From the terms of the option letter it would appear that the plaintiff expected to sell the Cheras land within a period of five to six months from the date of the option letter. Datin Peggy Taylor, in her evidence before the senior assistant registrar on 23 December 1980 on the assessment of damages said, 'Assuming that a purchaser had been secured, 90% of the purchase (transaction) would have been completed in July 1976.' By this time the Cheras land was about to be released from the charge since the defendant had agreed to release the charge under the term of the contract by 31 August 1976.

On 31 August 1976, the defendant failed or neglected to release the charge. In her affidavit affirmed on 19 May 1977, Datin Peggy Taylor averred that in October 1976 she met one Mr Lim Foo Yong of the defendant company who assured her that he would release the charge. In November 1976 she spoke to Mr Lim Ooi Beng, the manager of the defendant company on the question of releasing the charge and Mr Lim Ooi Beng told her that he would definitely do so in December 1976. She further averred that she informed Mr Lim Ooi Beng that 'the failure to discharge the charge has put the plaintiff into great financial difficulties and mental stress.' According to her, as a result of all these problems the plaintiff was advised by his physician to return to London for treatment and complete rest. Following the advice of the physician the plaintiff returned to London. He died in England on 8 August 1977. The defendant did not comply with its obligation under the contract to release the charge of the Cheras land until Abdul Hamid J, on 27 May 1977 ordered the defendant to do so. As already stated, the learned judge also found that the defendant had been in breach of the contract and ordered that damages be assessed. As already stated, Abdul Hamid J's decision was confirmed by the Federal Court on 24 September 1979.

It appears from the evidence that the plaintiff had suffered financial difficulties as a result of the breach of contract by the defendant. As already stated, Datin Peggy Taylor mentioned in her affidavit affirmed on 19 May 1977 that the failure to release the charge on the Cheras land had put the plaintiff into great financial difficulties. In her affidavit affirmed on 10 October 1980 she said that she was forced to sell the Kenny Hill house to overcome financial difficulties experienced by the plaintiff's firm. In her evidence before the senior assistant registrar she said, 'To assist me in my husband's financial difficulties Mr Yeoh Poh San agreed to purchase the property from me.'

The question here is what were the financial difficulties that the plaintiff was experiencing. In her affidavit affirmed on 10 October 1980, Datin Peggy Taylor averred that she had to sell the Kenny Hill house to overcome financial difficulties experienced by the plaintiff's firm brought on by tardy payments of professional fees by clients. Indeed there were five civil suits filed by the plaintiff for non-payment of professional fees outstanding. It appears that the plaintiff wanted to sell the Cheras land because he was desperately in need of cash. As Datin Peggy Taylor said in her affidavit affirmed on 10 October 1980, 'funds were urgently required.'

In the course of his submission in the present appeal, Mr Pradhan, counsel for the defendant said that the plaintiff was not in difficult financial circumstances. In support of his submission, he referred to para 22 of his written submission before the senior assistant registrar. In para 22 of his written submission he stated that exh P5 showed that the plaintiff found Flat 2, Hereford House, No 24-26 Hereford Square, Kensington, London SW7 in October 1975. He also stated that the plaintiff, together with his wife entered into a contract to purchase the flat on 23 January 1976 and the purchase was completed on 23 February 1976. He further stated that this date, 23 February was much before the date of the option of 12 April 1976 for the sale of the Cheras land and more than six months prior to 31 August 1976 which was the date the Cheras land was to be discharged. Mr Pradhan went on to state that at the same time the plaintiff had in the United Kingdom a sum of £15,000 (at that time approximately $78,000) which was used to pay the difference between the price of £34,500 for the flat and the sum of £19,500 obtained from the mortgages.

I have examined the exh P5. It is a letter from Messrs Cameron & Markby, London to Datin Peggy Taylor dated 30 December 1980. According to P5, the flat at Hereford Square was purchased by the plaintiff and his wife on 23 February 1976 for £34,500. Paragraph 4 of the letter (P5) states, 'To assist in the purchase finance was supplied by means of a first mortgage from Northern Rock Building Society for £13,000 and a second mortgage to Sun Life Assurance for £6,500 ...'. The rest of the purchase money was paid from their savings in a building society in England. It appears from

another exhibit, P6, that the mortgage loan of $13,000 was for a period of 15 years and the interest rate was 11.5%. According to P6, the plaintiff had to pay back the mortgage loan to Northern Rock Building Society £159 pm by way of monthly instalments. It seems to me, one of the reasons why the plaintiff was in need of funds was to pay the monthly instalments for the flat.

A question may be asked: If the plaintiff was in financial difficulties, why did he not sell the flat to recover the £15,000 savings plus profit. It will be recalled that the plaintiff, on the advice of his physician, had left for England in December 1976 for treatment. Since that date he had lived in England until his death on 8 August 1977. While he was in England during that period he was staying in the flat at Hereford Square. In his death certificate which was exhibited to the petition for letters of administration it was certified that his usual address in England was 24, Hereford Square, South Kensington, London SW7. (See court file petition No 119 of 1978 which was referred to by the defendant at the hearing before the senior assistant registrar). In the circumstances, it was not possible for the plaintiff to sell the flat. I should add here that the said flat was purchased on 23 February 1976. The contract with the defendant was made on 24 March 1976. The plaintiff hoped to sell the Cheras land after 31 August 1976 since the defendant had agreed to recover the title deed from the Bangkok Bank on that date. I would agree with Mr Pradhan's submission if the London flat was bought after 31 August 1976. In that event the plaintiff would have no justification to say that he was in financial difficulties as a result of the default. In my opinion, in the circumstances of the present case, the plaintiff did suffer financial difficulties as a result of the breach of contract and the argument contained in para 22 of Mr Pradhan's written submission has no merit at all.

Since the plaintiff was undergoing medical treatment in London, and in view of the mortgage loan monthly instalments in respect of the flat at Hereford Square, I am sure these must have added on to the financial problems experienced by the plaintiff's problems. The only way of getting funds was to sell the Cheras land to overcome the financial difficulties. But the defendant, in breach of the said contract, did not secure the release of the title deed from the Bangkok Bank until the court ordered them to do so. The Cheras land therefore could not be sold. The property valuer (PW2) in his evidence, said that land subject to charge could be sold. But he added, however, that, 'It's true that such land is less desirable than land that is free from encumbrances.' When Datin Peggy Taylor was cross-examined by Mr Pradhan, at the hearing before the senior assistant registrar, she said that the Cheras land was charged and due to that she was unable to sell it. She added, 'Efforts made by me to sell the land came to no availability, when it came to be known that the land was charged and the purchaser wanted to know when the land charge could be discharged.' She also said that her husband made efforts to sell the Cheras land.

In the circumstances therefore the plaintiff had no other choice but to sell the Kenny Hill house in order to overcome the financial difficulties. In her affidavit affirmed on 10 October 1980, Datin Peggy Taylor said that the plaintiff was forced to sell the matrimonial house at Kenny Hill. She added that the 'failure of the defendant to complete the said agreement by discharging the said land compelled the plaintiff to sell our matrimonial house in Kenny Hill as a last resort.' The Kenny Hill house was sold to one Mr Yeoh Poh San of Messrs Adlan & Haji Suhaimi for $300,000 on 2 February 1977 (see sale and purchase agreement exhibited to the affidavit of Datin Peggy Taylor affirmed on 10 October 1980). In that affidavit, she said that the sale of the house was sold at a loss because it was not a very good time to sell residential properties and the plaintiff was compelled to accept a lesser price in order to make a quick sale as funds were urgently required. According to her the conservative market value at the time of sale was $400,000. This figure was based on a valuation report prepared by a firm of chartered valuers, which was exhibited to the same affidavit. Datin Taylor said that because of the forced sale, the plaintiff had suffered a loss of $100,000.

By reasons of the forced sale of the Kenny Hill house, Datin Taylor was compelled to rent a flat at No 207-B, Jalan Pekeliling, Kuala Lumpur for $1,000 a month for the period from 15 February 1977 to 15 October 1980. She claimed that she had suffered a loss of $44,000 being rental payments during that period. Two copies of the tenancy agreements were exhibited to the same affidavit. In my view this claim is not without merit. See *Bee Chuan Rubber Factory Sdn Bhd* v *Loo Sam Mooi*.[7]

She also claimed for loss of income from rental from the Cheras land amounting to $37,500. Her claim was supported by a valuation report exhibited to the affidavit. The report stated that the income that could be derived from the Cheras land from August 1976 to September 1980 was estimated at $37,500. Mr Pradhan conceded that this type of loss could be considered by the court. He referred to para 8 of his written submission which stated that the inability of the plaintiff to lease out the Cheras land was relevant in as much as it was related to the Cheras land 'and thus could be said to arise naturally in the usual course of things from the defendant's breach of promise to discharge the Cheras land.' He said, however, that although the Cheras land was charged, it could still be leased out. Accordingly he said, the plaintiff could not claim damages for loss of rental in respect of the Cheras land. The senior assistant registrar, who had considered the valuation report and other evidence, had found that

the plaintiff had suffered a loss of rental on the land. I agree with the decision of the senior assistant registrar and I do not wish to disturb her finding.

Datin Peggy Taylor claimed that she suffered these losses as a result of the non-performance of the contract dated 24 March 1976 in discharging the title deed of the Cheras land. As already stated, the court had earlier ruled that there was a breach of contract in the present case and the contract breaker was the defendant. In my opinion, the plaintiff had suffered losses and all these losses arose naturally in the usual course of things from the breach of contract itself. See *Hadley* v *Baxendale*.[1] In other words these were all losses, which flowed from the breach of contract itself: *Tan Chin Kim Sawmill and Factory Sdn Bhd* v *Lindeteves-Jacoberg (M) Sdn Bhd*.[8] In order to make a particular loss recoverable it is not necessary for the plaintiff to prove that the defendant could, as a reasonable man, foresee that a breach must necessarily result in that particular loss: *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd*[4] at p 540. Lord Reid, in his speech in the *Koufos* case at p 390 stated, 'For the best part of a century it has not been required that the defendant could have foreseen that a breach of contract must necessarily result in the loss which has occurred.'

The senior assistant registrar, after hearing the evidence of witnesses and after considering the documentary evidence had assessed damages in the sum of $181,500. This figure is the total sum of the losses mentioned above. In my opinion the plaintiff is entitled to claim the losses she and her husband had suffered. I think the senior assistant registrar was right in arriving at a figure of $181,500 and I do not wish to disturb her finding on assessment of damages.

In the circumstances, I dismiss the appeal with costs to be taxed. I confirm the final judgment entered by the senior assistant registrar against the defendant on 28 July 1981 in the sum of $181,500 with costs to be taxed and to be paid by the defendant to the plaintiff. I order that the defendant pay interest at the rate of 8% pa from the date of final judgment, that is, 28 July 1981 to date of realization.

Order accordingly.

Solicitors: *Skrine & Co*; *Shearn Delamore & Co*.

Reported by *PS Ranjan*

Clarence D Bongkos Malakun v The Returning Officer & Ors

HIGH COURT (KOTA KINABALU) – ELECTION PETITION NO 5 OF 1985
CHONG SIEW FAI J
30 JUNE 1988

Election – Petition lodged to challenge disqualification of petitioner from being a member of the Sabah Legislative Assembly by virtue of his holding of an office of profit – Whether such petition had abated or dropped by reason of the dissolution of the State Legislative Assembly – Election Offences Act 1954 – Election Petition Rules 1954, rr 27 to 29

The petitioner filed an election petition challenging the rejection of his electoral nomination in the election to the Sabah State Legislative Assembly in April 1985. At the hearing of the petition, the third respondent, who was a candidate in the election, raised a preliminary objection, on the grounds that (i) the petition had abated or dropped by reason of the dissolution of the State Legislative Assembly; (ii) having regard to the election law, in particular, the Election Offences Act 1954, upon such dissolution, the jurisdiction of the election court was forfeited by operation of law and (iii) assuming that the court had jurisdiction to hear the petition and to declare the petition void, dire consequences would follow as under the Election Offences Act 1954 it was mandatory that notice of election be given within one month by the Election Commission and yet no fresh by-election could be held as an election had already been held.

Held, dismissing the preliminary objection:

(1) There is no statutory provision for the abatement of the petition on the dissolution of the Assembly. The provisions relating to the abatement or otherwise of an election petition are contained in rr 27 to 29 of the Election Petition Rules 1954 from which it could be seen that once an election petition is presented to the High Court, it will not necessarily abate or fail by reason of the death of the petitioner or any of the respondents or by their ceasing to have any further interest in it. It was clear that the intention is to prevent the election process on which the democratic system of government is based from being abused or misused by any candidate and to ensure that trial of an election petition would not be frustrated by collusion between parties to the petition or by their deaths.

(2) The giving of notice of election under s 36 of the Election Offences Act 1954 is not mandatory and the words used in that section had to be given their ordinary and natural meaning.

(3) The English authorities on the abatement of a petition on the dissolution of Parliament have no application in the Malaysian context having regard to the statute law and circumstances prevailing in Malaysia which govern the practice and procedure thereof.

Cases referred to

1 *Carter & Anor* v *Mills* (1873-74) LR 9 CP 117 (distd)
2 *Marshall* v *James* (1873-74) LR 9 CP 702 (distd)
3 *Shivdev Singh* v *Dara Singh & Ors* [1953] 5 ELR 496 (refd)
4 *Sheo Sadan Singh* v *Mohan Lal Gautam* [1969] (1) SCC 408 (folld)
5 *Yong Kuan Teik* v *Devan Nair* [1965] 2 MLJ 162 FC (folld)
6 *Loknath Padhan* v *Birendra Kumar Sahu* [1974] 1 SCC 526 (distd)